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No. 10-

IN THE
Supreme Court of the United States

TROY BARBOUR,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, allows a criminal conviction based on a nonunanimous jury verdict.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Troy Barbour respectfully petitions for a writ of certiorari to the Louisiana First Circuit Court of Appeal in *State v. Barbour*, No. 2009-KA-1258.

OPINIONS BELOW

The judgment of the Louisiana First Circuit Court of Appeal (Pet. App. A) is reported at 35 So. 3d 1142 (La. App. 2010), and is reprinted at Pet. App. 1a. The Louisiana Supreme Court's order denying review of that decision (Pet. App. B) is unpublished and is reprinted at Pet. App. 23a.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana Fourth Circuit Court of Appeal was entered on March 24, 2010. The Louisiana Supreme Court denied review of this decision on November 19, 2010. Pet. App. 23a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 17(A) of Article I of the Louisiana Constitution provides in relevant part: "A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict."

Article 782 of the Louisiana Code of Criminal Procedure provides, in pertinent part: "Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict."

STATEMENT OF THE CASE

This case raises an issue that goes to the heart of our Constitution's guarantee that individuals accused of a crime receive certain fundamental procedural protections: whether a jury may convict a defendant of a crime based on a less than unanimous jury verdict. Thirty-eight years ago, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), this Court held in a 4-1-4 decision that the Sixth and Fourteenth Amendments do not prohibit States from securing criminal convictions in this manner. Subsequent legal developments and academic studies call this result into serious question.

1. In 2005, Donald Baker hired petitioner Troy Barbour to help him with a construction project. Both men had prior criminal convictions, but neither had any violent history. The two men often quarreled, in part because Baker often refused to pay petitioner in a timely manner.

In early 2006, petitioner went to see Baker at the project. Petitioner testified at trial that he did so because Baker had called and told him he could come collect several thousand dollars in past wages. Upon arriving, petitioner noticed that "Baker was under the influence of crack cocaine" because "Baker's eyes were bulging and he was breathing hard." Pet. App. 10a. Baker later denied being under the influence, even though a blood test taken later at the hospital found cocaine in his system. Pet. App. 3a.

The two men then had an altercation in which petitioner shot Baker several times. Baker was seriously injured but did not die. Immediately after the shooting, both men attempted to thwart the police's investigation. Petitioner evaded the police. Baker "lied" about owning a gun and claimed that someone besides petitioner had shot him. Pet. App. 17a. Eventually, petitioner testified that he had acted in self-defense, after Baker had pulled out a .44 Magnum and reached to take a shot at him. Pet. App. 9a. For his part, Baker claimed that petitioner had shot him without warning or provocation. Pet. App. 2a-3a. No physical evidence favored either story.

The State apparently believed Baker's version of events and charged petitioner in the Criminal District Court, Orleans Parish with attempted second degree murder. After a two-day "he said, she said" trial, the 12-person jury voted 10-2 to convict petitioner. While first-degree murder in Louisiana is a capital crime and requires a unanimous verdict to convict, second-degree murder is punishable only by life in prison and does not require unanimity to convict. The State in such a prosecution need only persuade ten of twelve jurors to vote guilty in order to secure a conviction. La. Const. art. I, § 17(A); La. C. Cr. P. Art. 782. Accordingly, over petitioner's objection that Louisiana's nonunanimity rule violates the Sixth and Fourteenth Amendments, Pet. App. 1a, the trial court entered judgment finding petitioner guilty as charged. The court sentenced him to forty-eight years and six months at hard labor.

2. The Louisiana Court of Appeal affirmed Petitioner's conviction. Relying on *Apodaca* and the Louisiana Supreme Court's decision in *State v. Bertrand*, 6 So. 3d 738 (La. 2009), the appellate court held that "because we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that nonunanimous 12-person jury verdicts are constitutional may someday be overturned," the 10-2 verdict in petitioner's case comported with the Sixth and Fourteenth Amendments. Pet. App. 19a (quoting *Bertrand*, 6 So. 3d at 743). Judge Belsome filed a concurring opinion "acknowledg[ing] that historically a defendant could not be convicted unless the jury verdict was unanimous," but noting that he

was powerless to act on that reality "until otherwise directed by the United States Supreme Court." Pet. App. 20a-22a.

3. Petitioner sought discretionary review in the Louisiana Supreme Court, arguing that convicting him by a non-unanimous jury verdict violated the Sixth and Fourteenth Amendments. The Louisiana Supreme Court denied discretionary review without comment. Pet. App. 23a

REASONS FOR GRANTING THE WRIT

Louisiana is one of two states that allows a person to be convicted of a felony by a less than unanimous jury verdict. (Oregon is the other. *See* Or. Const. art. I § 11; Or. Rev. Stat. § 136.450.) This practice contravenes centuries of common law, as well as longstanding American precedent, requiring unanimity to convict in criminal cases. Nevertheless, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), a bare majority of this Court – in a deeply fractured, internally contradictory decision – held that the Constitution does not forbid the states from securing convictions by non-unanimous verdicts.

Subsequent developments in this Court's Sixth and Fourteenth Amendment jurisprudence call the five-vote judgment in *Apodaca* into serious question. In terms of the Sixth Amendment, the plurality opinion in *Apodaca* is squarely inconsistent with this Court's recent, repeated pronouncements in cases reviewing criminal convictions from state courts that the Sixth Amendment requires "that the 'truth of

every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, Commentaries on the Laws of England *343 (1769)); *accord Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *see also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010) ("[T]he Sixth Amendment right to trial by jury requires a unanimous jury verdict.") In terms of the Fourteenth Amendment, Justice Powell's concurring opinion cannot be squared with this Court's holding last term in *McDonald* that "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle": "incorporated Bill of Rights protections are to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." 130 S. Ct. at 3035, 3048 (internal quotation and citation omitted).

Nevertheless, the Louisiana Supreme Court and the Oregon courts have concluded that they are powerless to effectuate *Apocada*'s demise. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodrigeuez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

This Court should exercise that prerogative now. *Stare decisis* has limited force in this case and the constitutional right at stake is enormously important. Furthermore, as Justice (then Judge) Kennedy has explained:

> The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict.

United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978). This Court should not allow this fundamental and time-honored protection to be denied any longer.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER THE CONSTITUTION ALLOWS STATES TO SECURE CRIMINAL CONVICTIONS BY NON-UNANIMOUS JURY VERDICTS.

A. This Court's Recent Jurisprudence Has Severely Undercut its Fractured Holding in 1972 that the Constitution Permits Convictions in State Criminal Trials by Non-Unamimous Verdicts.

A comparison between *Apodaca v. Oregon*, 406 U.S. 404 (1972), and this Court's recent Sixth and Fourteenth Amendment jurisprudence demonstrates that the two are irreconcilable.

1. *Apodaca v. Oregon*

The question whether the Constitution permits a State to convict an individual of a crime based on a non-unanimous jury verdict turns on two sub-issues: (1) whether the Sixth Amendment's jury trial clause requires unanimity for criminal convictions; and (2) if so, whether that constitutional rule applies to the States by means of the Fourteenth Amendment. In *Apodaca*, five Justices answered the first sub-issue affirmatively, and eight answered the second affirmatively (or at least assumed the answer was yes). Yet because of the odd voting patterns in the Court's badly fractured 4-1-4 decision, the Court nevertheless ruled by a bare majority that States may convict individuals of crimes notwithstanding one or two jurors voting "not guilty."

a. The four-Justice plurality in *Apodaca* acknowledged that it had been "settled" since "the latter half of the 14th century . . . that a verdict had to be unanimous" to convict someone of a crime and that this requirement "had become an accepted feature of the common-law jury by the 18th century." *Id.* at 407-08 & n.2. Indeed, this Court had held or assumed in numerous previous cases that the Sixth Amendment required unanimity for a criminal conviction. *See Andres v. United States,* 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required" where the Sixth Amendment applies); *accord Patton v. United States,* 281 U.S. 276, 288 (1930); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Thompson v. Utah*, 170 U.S. 343, 351 (1898). Justice Story likewise explained in his noted Commentaries that any law dispensing with the requirement that jurors "must *unanimously* concur in the guilt of the accused before a legal conviction can be had . . . may be considered unconstitutional." 2 Joseph Story, Commentaries on the Constitution § 1779 n.2 (1891) (emphasis in original). And this Court had long since resolved that the Seventh Amendment's jury trial guarantee for civil trials required unanimity. *See American Pub. Co. v. Fisher,* 166 U.S. 464, 467-68 (1897).

The *Apodaca* plurality nonetheless concluded that the unanimity requirement "was not of constitutional stature" in criminal cases. 406 U.S. at 406. It did so for two primary reasons. First, the plurality asserted that instead of following history, "[o]ur inquiry must focus upon the *function* served by the

jury in contemporary society." *Id.* at 410 (emphasis added). After identifying the jury's function as interposing "the commonsense judgment of a group of laymen" between the accused and his accuser, the plurality found that "[i]n terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Id.* at 410-11 (quotation omitted).

Second, in response to Apodaca's argument that the Sixth Amendment requires jury unanimity in part "to give effect of the reasonable-doubt standard," the plurality asserted that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." *Id.* at 412. "We are quite sure," the plurality emphasized, "that the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases." *Id.* at 411.

b. Justice Powell provided a fifth vote by concurring in the plurality judgment. He did so, however, by disagreeing with the plurality on both sub-issues presented in the case. In his joint opinion in *Apodaca* and a companion case, Justice Powell stated that he believed, "in accord with both history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial." *Johnson v. Louisiana,* 406 U.S. 366, 371 (1972) (Powell, J., concurring in the judgment). But he also expressly rejected the plurality's "major premise" that "the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept

required by the Sixth Amendment." *Id.* at 369. "Viewing the unanimity controversy as one requiring a fresh look at the question of what is fundamental in jury trial," Justice Powell found "no reason to believe . . . that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial, or is entitled to greater respect in the community, than the same decision joined by 10 members of a jury of 12." *Id.* at 374, 376.

c. The four dissenters objected to the Court's judgment as a "radical departure from American traditions." *Johnson,* 406 U.S. at 381 (Douglas, J., dissenting). The dissenters bemoaned the plurality's decision to abandon the previously "universal[] understanding that a unanimous verdict is an essential element of a Sixth Amendment jury trial." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting); *see also Johnson,* 406 U.S. at 395 (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting). The dissenters also disagreed with Justice Powell's rejection of the settled rule that the Sixth Amendment's jury trial guarantee "is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting) (emphasis added).

As Justice Brennan summed up the situation:

> Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in [*Apodaca*], when a majority of the Court agrees that the Sixth Amendment requires a unanimous

> verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my Brother Powell agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments.

Johnson v. Louisiana, 406 U.S. at 395 (Brennan, J. dissenting); *see also McDonald*, 130 S. Ct. at 3035 n.14 (emphasizing that the outcome in *Apodaca* "was the result of an unusual division among the Justices").

2. This Court's Current Sixth Amendment Jurisprudence

This Court's modern approach to Sixth Amendment jurisprudence renders *Apodaca* anachronistic. In fact, all three theoretical predicates on which the plurality and Justice Powell's opinions are based have been substantially undercut – if not brought directly into disrepute – by this Court's recent Sixth Amendment decisions.

a. While the *Apodaca* plurality focused "upon the function served by the jury in contemporary society," 406 U.S. at 410, this Court recently has made clear that the Sixth Amendment derives its meaning not from functional assessments of the Amendment's

purposes but rather from the original understanding of the guarantees contained therein. In *Crawford v. Washington,* 541 U.S. 36 (2004), this Court abandoned the functional, reliability-based conception of the Confrontation Clause conceived in *Ohio v. Roberts,* 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers. In *Giles v. California,* 128 S. Ct. 2678 (2008), this Court continued that trend, explaining that "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen." *Id.* at 2692. In *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006), this Court similarly rejected an approach to the right to counsel that would have "abstract[ed] from the right to its purposes" and left it to this Court whether to give effect "to the details." *Id.* at 145 (quotation omitted).

Most importantly, in a line of cases beginning with *Apprendi v. New Jersey,* 530 U.S. 466 (2000), this Court has eschewed a functional approach to the right to jury trial in favor of the "practice" of trial by jury as it existed "at common law." *Id.* at 480. In the course of holding that all sentencing factors that increase a defendant's potential punishment must be proven to a jury beyond a reasonable doubt, this Court emphasized that "[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal

justice." *Blakely v. Washington*, 542 U.S. 296, 313 (2004). Rather, the controlling datum is "the Framers' paradigm for criminal justice." *Id.*

This pronounced shift in constitutional methodology itself – the return to historical analysis – calls *Apodaca* into serious question. But this Court has gone further. In the *Apprendi* line of cases, this Court explicitly has reaffirmed that the "longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment embodies include the rule "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, Commentaries on the Laws of England 343 (1769). This Court further explained in *Booker v. United States*:

> More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. . . . As we noted in *Apprendi*:
>
> "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should

> afterwards be confirmed by the *unanimous* suffrage of twelve of [the defendant's] equals and neighbours . . . ."

543 U.S. 220, 238-239 (2005) (second emphasis added) (quotation omitted); *see also Apprendi*, 530 U.S. at 498 (Scalia, J. concurring) (charges against the accused must be determined "beyond a reasonable doubt by *the unanimous vote of 12 of his fellow citizens*") (emphasis in original). Most recently, this Court flatly stated in *McDonald* that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict." 130 S. Ct. at 3035 n.14.

The *Apodaca* plurality's functional view of the Sixth Amendment cannot be squared with these repeated pronouncements.

b. This Court similarly has disregarded the *Apodaca* plurality's assertion that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." 406 U.S. at 412. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), this Court unanimously held:

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [*In re Winship*, 397 U.S. 358 (1970)] requires) whether he is guilty

> beyond a reasonable doubt. *In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

Sullivan, 508 U.S. at 278 (second emphasis added). The *Sullivan* Court concluded that a defendant's "Sixth Amendment right to jury trial" is "denied" when a jury instruction improperly defines the concept of reasonable doubt. *Id.*

This Court likewise explained in *Cunningham v. California*, 127 S. Ct. 856 (2007) – another case applying the *Apprendi* rule to a state sentencing system – that "[t]his Court has repeatedly held that, *under the Sixth Amendment*, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, *and established beyond a reasonable doubt*, not merely by a preponderance of the evidence." *Id.* at 863-64 (emphasis added).

It takes little reflection to perceive that the holdings and reasoning in *Sullivan* and *Cunningham* are in serious tension with the plurality's reasoning in *Apodaca*. The pronouncements respecting the Sixth Amendment in all three cases cannot all be right.

3. This Court's Current Fourteenth Amendment Jurisprudence

Justice Powell's partial-incorporation analysis cannot withstand scrutiny either. Even when *Apodaca* was decided, Justice Powell's notion of

applying a clause in the Bill of Rights in a piecemeal manner to state proceedings was difficult to square with this Court's previous "reject[ion of] the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960)). But whatever its viability in 1972, this Court's modern Fourteenth Amendment jurisprudence has long since rendered Justice Powell's "partial incorporation" methodology untenable. In *Crist v. Bretz,* 437 U.S. 28 (1978), the state argued that a particular aspect of the Fifth Amendment's double jeopardy guarantee should not be incorporated against the States. Although Justice Powell agreed with this argument, this Court rejected it, holding that when a component of the Bill of Rights that applies against the States is "a settled part of constitutional law" and protects legitimate interests of the accused, it must apply with equal force to the States. *Id.* at 37-38.

From that point forward, this Court has never approached an incorporation issue – or any other due process issue – by taking, as Justice Powell thought entitled to do, a "fresh look" in public policy terms at whether a given right is essential. 406 U.S. at 376. Rather, the Court has made clear that "crucial guideposts" under the Due Process Clause are now "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quotation omitted); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality

opinion) (due process requires adherence to rights that are "deeply rooted in this Nation's history and tradition"). As even Justice Powell recognized, those historical guideposts demonstrate that at the time of the Founding, "unanimity had long been established as one of the attributes of a jury conviction." *Johnson,* 406 U.S. at 371 (Powell, J., concurring in the judgment in *Apodaca*); *see also supra* at 8 (collecting other historical citations). That reality should settle the question.

If there were any lingering doubt about the legitimacy of Justice Powell's partial incorporation theory – whether in general terms or as applied in particular to the Sixth Amendment's unanimity guarantee – this Court dispensed with it last term in *McDonald.* The City of Chicago, as well as Justice Stevens in dissent, argued there that guarantees in the Bill of Rights "need not be identical in shape or scope to the rights protected against Federal Government infringement." 130 S. Ct. at 3048. Emphasizing that *Apodaca* was "not an endorsement of the two-track approach to incorporation," *id.* at 3035 n.14, this Court categorically rejected the argument. "The relationship between the Bill of Rights' guarantees and the States," this Court explained, "must be governed by a single, neutral principle": "incorporated Bill of Rights protections are to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.* at 3035, 3048 (internal quotation and citation omitted). This Court thus made clear that it had "abandoned the notion that

the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." *Id.* at 3035 (internal quotation marks and citation omitted). "[I]t would be incongruous to apply different standards depending on whether the claim was asserted in a federal or state court." *Id.* (internal quotation marks and citation omitted).

Indeed, this Court's modern Sixth Amendment decisions are already fully consistent with this approach. In *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, this Court applied the *Apprendi* rule to state proceedings without even pausing to consider whether that aspect of the right to trial by jury applied to the States. This Court, in recent years, has proceeded in the same holistic manner with respect to the Sixth Amendment's Confrontation Clause, *see Crawford,* 541 U.S. 36; *Davis v. Washington,* 547 U.S. 813 (2006); the right to counsel, *Alabama v. Shelton,* 535 U.S. 654 (2002); *Strickland v. Washington,* 466 U.S. 669 (1984); and the right to compulsory process, *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987). Justice Powell's controlling methodology in *Apodaca* stands as the sole exception to decades of otherwise unbroken precedent.[1]

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[1] To be sure, this Court has held that some guarantees in the Bill of Rights, such as the Fifth Amendment's Grand Jury Clause, do not apply to the States at all. *See Beck v. Washington,* 369 U.S. 541, 545 (1962); *Hurtado v. California,* 110 U.S. 516 (1884). But Justice Powell's opinion in *Apodaca* stands alone as holding that a component of the Bill of Rights that *does* apply to state proceedings does not apply in the same manner, or with the same force, as in federal trials.

B. The Doctrine of *Stare Decisis* Does Not Pose a Significant Impediment to Reconsidering the Question Presented Afresh.

This Court explained in *McDonald* that "if a Bill of Rights guarantee if fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States." 130 S. Ct. at 3036 (footnote omitted). This Court dropped a footnote attached to its reference to *stare decisis*, referencing the Fifth Amendment's Grand Jury Clause, but it did not mention *Apodaca*. It is hard to believe that omission was accidental. For three reasons, the doctrine of *stare decisis* should not stand in the way of this Court's reconsidering the result in *Apodaca* to bring it into line with this Court's current approach to the Sixth and Fourteenth Amendments.

1. Principles of *stare decisis* are at their nadir where a case results in a plurality opinion because no five Justices are able to muster a controlling view concerning the law. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), for example, this Court reconsidered and overturned a prior decision – *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) – in part because a majority of the Court (the concurring opinion providing the fifth vote, as well as the dissent) had "expressly disagreed with the rationale of the plurality." *Id.* at 66.

The same is true here. *Apodaca* was a deeply fractured decision. Both Justice Powell's concurrence and the four dissenters expressly disagreed

with the plurality's view that the Sixth Amendment does not require unanimous verdicts to convict. Furthermore, the eight other Justices on the Court disagreed with Justice Powell's "partial incorporation" rationale. *Apodaca,* therefore, is entitled only to "questionable precedential value." *Seminole Tribe,* 517 U.S. at 66.

2. *Stare decisis* has minimal force when the decision at issue "involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock,* 309 U.S. 106, 119 (1940). Indeed, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 231 (1995). When faced with such situations, therefore, this Court repeatedly has determined that the better course is to reinstate the prior, traditional doctrine. *See id.* at 231-32; *United States v. Dixon,* 509 U.S. 688, 704 (1993) (overruling recent decision that "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent"); *Solorio v. United States*, 483 U.S. 435, 439-41 (1987) (overruling decision that had broken from an earlier line of decisions "from 1866 to 1960"); *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977) (overruling case that was "an abrupt and largely unexplained departure" from precedent); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965) (overruling recent decision to reinstate

the "view . . . which this Court ha[d] traditionally taken" in earlier cases).

As Justice Powell and the dissenters in *Apodaca* noted without contradiction from the plurality, the plurality's view that the Sixth Amendment does not require unanimity broke sharply from "an unbroken line of cases reaching back to the late 1800's" – and, indeed, from hundreds of years of common law practice. *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment in *Apodaca*); *see also Apodaca*, 406 U.S. at 414-15 (Stewart J., dissenting) ("Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. . . . I would follow these settled Sixth Amendment precedents and reverse the judgment before us.") (citations omitted). Justice Powell's "partial incorporation" rationale likewise ignored this Court's prior precedent that "the Sixth Amendment right to trial by jury in a federal criminal case is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca*, 406 U.S. at 414 (Stewart J., dissenting) (emphasis added); *see also supra,* at 10. Overruling *Apodaca*, therefore, would do nothing more than reinstate the traditional meaning of the Sixth and Fourteenth Amendments. It also would extinguish the schism with this Court's longstanding Seventh Amendment jurisprudence requiring unanimity in civil cases.

3. *Stare decisis* considerations also wane considerably "in cases . . . involving procedural and evidentiary rules," in part because such rules

generally do not induce the same kinds of individual or societal reliance as other kinds of legal doctrines. *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). Such is the case here. The rules governing juror voting are quintessentially procedural rules. What is more, in the thirty-eight years since *Apodaca* was decided, not a single state has retreated from its requirement that jury verdicts be unanimous to convict in criminal cases. Louisiana and Oregon remain the sole outliers, in exactly the same position as they were in 1972. And no other constitutional doctrine or legislation depends on the continued validity of *Apodaca*. To the contrary, *Apodaca* is an increasingly unexplainable anomaly in this Court's constitutional criminal procedure jurisprudence.

C. The Question Whether States May Continue to Convict Individuals of Serious Crimes Based on Non-Unanimous Verdicts is Extremely Important and Ripe for Consideration.

1. Empirical research conducted since *Apodaca* confirms the wisdom of the historical unanimity requirement and highlights the importance of enforcing that constitutional mandate.

a. The *Apodaca* plurality defended its decision in part based on an assumption that a unanimity requirement "does not materially contribute to the exercise" of a jury's "commonsense judgment." 406 U.S. at 410. The plurality hypothesized:

> [W]e perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

Id. at 411 (footnote omitted).

Evidence amassed from both mock juries and actual Arizona jury deliberations occurring over the last half-century reveals that the plurality's assumptions were incorrect. Specifically, "[s]tudies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials* 24, available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf (last accessed February 27, 2009). As Professors Shari Seidman Diamond, Mary R. Rose, and Beth Murphy explain:

> The Arizona jury deliberations reveal that some of the claims made in favor of dispensing with unanimity are unfounded. The image of eccentric holdout jurors outvoted by sensible majorities receives no support. Indeed, the

> judge agreed with the verdict favored by the holdouts in a number of these cases. Instead, the deliberations demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity.
>
> The primary cost frequently attributed to the unanimity requirement is that it increases the rate of hung juries, a cost that seems overblown in light of the low frequency of hung juries in civil cases, even when unanimity is required. More importantly, a slight increase in hung juries and the potential for a longer deliberation may be costs outweighed by the benefits of a tool that can stimulate robust debate and potentially decrease the likelihood of an anomalous verdict.

Shari Seidman Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 230 (2006). Other scholars have reached similar conclusions. *See* Kim Taylor Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (noting "[a] shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment"); John Guinther, The Jury in America 81 (1988) (finding that non-

unanimous juries correct each other's errors of fact less frequently than do juries required to reach unanimity).

b. The *Apodaca* plurality further assumed that allowing non-unanimous verdicts would not marginalize jurors who are members of minority groups. 406 U.S. at 413. This assumption also appears misguided. After considering the effect of non-unanimity rules on dissenting voices, the American Bar Association's American Jury Project concluded that "[a] non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." *See* Principles for Juries and Jury Trials, *supra*, at 24. Empirical studies corroborate the observation that jurors who have divergent views contribute more vigorously to jury deliberations when operating under a unanimous verdict scheme. *See id.*; Reid Hastie et al., Inside the Jury 108-12 (1983). It thus comes as no surprise that members of racial and ethnic minorities are often the ones who are outvoted in non-unanimous verdicts. *See, e.g., State v. Potter*, 591 So. 2d 1166, 1167 (La. 1991) ("The vote was eleven to one with the sole 'not guilty' vote cast by one of the black members of the jury. Eleven blacks were peremptorily challenged by the state during voir dire . . . ."). Such verdicts-by-majority-rule undermine the public credibility of our judicial system. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1278 (2000).

The comprehensive empirical research affirming the wisdom of the unanimity requirement, as well as the disproportionately negative impact of non-unanimity rules on jurors of color, led the American Bar Association to conclude that "[a] unanimous decision should be required in all criminal cases heard by a jury." *Principles for Juries and Jury Trials*, *supra*, at 23. Numerous other organizations and commentators have concluded the same. *See, e.g.*, Dennis J. Divine, et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) (reviewing all available social science and concluding that laws allowing non-unanimous verdicts have a significant effect when prosecution's case "is not particularly weak or strong").

2. The consequences of Louisiana and Oregon continuing to allow criminal convictions based on non-unanimous jury verdicts are serious and will continue until this Court steps in. It is not at all uncommon for defendants in these states to be convicted by non-unanimous verdicts. Over the past five years alone, the Louisiana appellate courts have noted over sixty cases in which defendants were convicted of felonies by non-unanimous verdicts[2] – a

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[2] *See* Pet. App. 18a-19a; *State v. Moody*, 38 So. 3d 451, 455 (La. App. 2010); *State v. Every*, 35 So. 3d 410, 420 (La. App. 2010); *State v. Sumrall*, 34 So. 3d 977, 990-91 (La. App. 2010); *State v. White*, No. 09-KA-1122, 2010 La. App. LEXIS 974, at *12 (La. App. June 29, 2010); *State v. Blow*, No. 45,415-KA, 2010 La. App. LEXIS 1148, at *43-45 (La. App. Aug. 11, 2010); *State v. Lawrence*, No. 2009-KA-1637, 2010 La. App. LEXIS 1188, at *27-28 (La. App. Aug. 25, 2010); *State v. Jones*, No. 2009 KA 2261, 2010 La. App. Unpub. LEXIS 258, at *9-11 (La. App. May

7, 2010); *State v. Blanchard*, No. 2010 KA 0014, 2008 La. App. Unpub. LEXIS 417, at *22 (La. App. July 08, 2010); *State v. Lomax*, 35 So. 3d 396, 403 (La. App. 2009); *State v. Jones*, 29 So. 3d 533, 540-41 (La. App. 2009); *State v. Regis*, 25 So. 3d 183, 189 (La. App. 2009); *State v. Taylor*, 21 So. 3d 421, 425 (La. App. 2009); *State v. Smith*, 20 So. 3d 501, 508 (La. App. 2009); *State v. Raymond*, 13 So. 3d 577, 593 (La. App. 2009); *State v. Tillman*, 7 So. 3d 65, 78 (La. App. 2009); *State v. Bertrand*, 6 So. 3d 738, 739 (La. App. 2009); *State v. Martin*, No. 2009 KA 1368, 2009 La. App. Unpub. LEXIS 784, at *4-5 (La. App. Dec. 23, 2009); *State v. Malone*, 998 So. 2d 322, 327 (La. App. 2008); *State v. Johnson*, No. 2008 KA 0500, 2008 La. App. Unpub. LEXIS 448, at *3-6 (La. App. Sept. 19, 2008); *State v. Daigle*, No. 2008 KA 0880, 2008 La. App. Unpub. LEXIS 555, at *6-8 (La. App. Oct. 31, 2008); *State v. Lloyd*, No. 2008/KA/0774, 2008 La. App. Unpub. LEXIS 579, at *2 (La. App. Nov. 14, 2008); *State v. Lee*, 964 So. 2d 967 (La. App. 2007), *cert. denied*, 129 S. Ct. 130 (2008); *State v. Ruiz*, 955 So. 2d 81, 83 (La. 2007); *State v. Elie*, 936 So. 2d 791, 794 (La. 2006); *State v. Mizell*, 938 So. 2d 712, 713 (La. App. 2006); *State v. Mack*, No. 43-KA-206, 2008 La. App. LEXIS 585 (La. App. Apr. 23, 2008); *State v. Brantley*, 975 So. 2d 849, 851 (La. App. 2008); *State v. Gullette*, 975 So. 2d 753, 758 (La. App. 2008); *State v. Linn*, 975 So. 2d 771, 772 (La. App. 2008); *State v. Carter*, 974 So. 2d 181, 184 (La. App. 2008); *State v. Ross*, 973 So. 2d 168, 171 (La. App. 2007); *State v. Baker*, 962 So. 2d 1198, 1201 (La. App. 2007); *State v. Allen*, 955 So. 2d 742, 746 (La. App. 2007); *State v. Tensley*, 955 So. 2d 227, 231 (La. App. 2007); *State v. Johnson*, 948 So. 2d 1229, 1239 (La. App. 2007); *State v. Williams*, 950 So. 2d 126, 129 (La. App. 2007); *State v. Mayeux*, 949 So. 2d 520, 535 (La. App. 2007); *State v. Brown*, 943 So. 2d 614, 620 (La. App. 2006); *State v. Payne*, 945 So. 2d 749, 750 (La. App. 2006); *State v. Riley*, 941 So. 2d 618, 622 (La. App. 2006); *State v. Chandler*, 939 So. 2d 574, 576 (La. App. 2006); *State v. Smith*, 936 So. 2d 255, 259 (La. App. 2006); *State v. Davis*, 935 So. 2d 763, 766 (La. App. 2006); *State v. Scroggins*, 926 So. 2d 64, 65 (La. App. 2006); *State v. Houston*, 925 So. 2d 690, 706 (La. App. 2006); *State v. Christian*, 924 So. 2d 266 (La. App. 2006); *State v. Zeigler*, 920 So. 2d 949, 952 (La. App. 2006); *State v. Wilhite*, 917 So. 2d 1252, 1258 (La.

number that substantially undercounts the frequency of such verdicts because many appellate decisions do not note non-unanimous verdicts. In Oregon, a recent study concluded that almost two-thirds of felony convictions involve at least one non-unanimous count. *See* Br. *Amici Curiae* of Jeffrey Abrahamson et al. at 7, *Bowen v. Oregon*, 130 S. Ct. 52 (2009) (No. 08-1117).

Defendants repeatedly have challenged the holding in *Apodaca* in recent years, and they continue to do so. But the Louisiana Supreme Court has made clear that it does not intend to question *Apodaca*. The Louisiana Supreme Court declared its nonunanimity rule "still valid" last year in light of *Apodaca*, *see State v. Bertrand*, 6 So. 3d 738, 741-43 (La. 2009), and, in the wake of this Court's decision in *McDonald*, it denied review in this case. Pet. App. 23a. The Oregon intermediate appellate courts likewise continually tell these defendants that only this Court can declare that *Apodaca* is no longer good law, and the Oregon Supreme Court continues to

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App. 2005); *State v. Hurd*, 917 So. 2d 567, 568 (La. App. 2005); *State v. Wiley*, 914 So. 2d 1117, 1121 (La. App. 2005); *State v. Bowers*, 909 So. 2d 1038, 1043 (La. App. 2005); *State v. Dabney*, 908 So. 2d 60, 65 (La. App. 2005); *State v. Jackson*, 904 So. 2d 907, 909 (La. App. 2005); *State v. Williams*, 901 So. 2d 1171, 1177 (La. App. 2005); *State v. Smith*, 952 So. 2d 1, 16 (La. App. 2006); *State v. Caples*, 938 So. 2d 147, 157 (La. App. 2006); *State v. Pitre*, 924 So. 2d 1176, 1182 (La. App. 2006); *State v. Juniors*, 918 So.2d 1137, 1147 (La. App. 2005), *cert. denied*, 549 U.S. 126 (2007); *State v. Jacobs*, 904 So. 2d 82, 92 (La. App. 2005); *State v. Newman*, 2006 KA 1037, 2006 La. App. LEXIS 3086, at *5 (La. App. Dec. 28, 2006).

deny discretionary review of the issue.[3] And because the nonunanimity rules in both Oregon and Louisiana are based on state constitutions, defendants cannot seek change on state law grounds.

The time has come for this Court to address the disjunction between *Apodaca* and this Court's current view of the Sixth and Fourteenth Amendments. No meaningful percolation can occur in the state courts. Nor is any further empirical research necessary. Two states in our Union have simply decided to violate criminal defendants' fundamental right to jury trial until this Court tells them they may no longer do so.

D. This Case Is An Ideal Vehicle For Reconsidering *Apodaca*.

In the past three Terms, a wide array of groups have filed *amicus* briefs urging this Court to grant certiorari to reconsider *Apodaca*: the American Bar Association, the National Association of Criminal Defense Lawyers, the Louisiana Association of Criminal Defense Lawyers, the Oregon Criminal Defense Lawyers Association, the Charles Hamilton Institute for Race and Justice, and various academic experts. *See Herrera v. Oregon*, No. 10-344 (currently pending); *Bowen v. Oregon*, 130 S. Ct. 52

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[3] *See State v. Pereida-Alba*, 189 P.3d 89 (Or. App. 2007), *rev. denied*, 197 P.3d 1104 (Or. 2008); *State v. Miller*, 166 P.3d 591, 599 (Or. App. 2007), *opinion modified on reh'g*, 176 P.3d 425 (Or. App. 2008); *State v. Phillips*, 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Norman*, 174 P.3d 598, 604 (Or. App. 2007); *State v. Rennels*, 162 P.3d 1006, 1008 n.2 (Or. App. 2007).

(2009) (No. 08-1117); *Lee v. Louisiana,* 129 S. Ct. 130 (2008) (No. 07-1523).[4] These groups have argued in various ways that condoning non-unanimous verdicts in criminal cases severely hampers the fair administration of justice and, indeed, the public perception of justice.

The strength of the collective pleas in these cases suggest this is a pressing issue that is not going to go away. And for three reasons, this case presents an ideal vehicle for considering whether our Constitution should continue to tolerate felony convictions by less than unanimous verdicts.

1. This case is from Louisiana, which would allow this Court to consider the constitutionality of nonunanimous verdicts in a setting that highlights the reasons why the Fourteenth Amendment should prohibit this practice. Both the majority and the dissenting opinions in *McDonald* emphasized that the Fourteenth Amendment was designed to guarantee to African Americans the "full and equal benefit" of the provisions of the Bill of Rights. 130 S. Ct. at 3040, 3043 (majority opinion) (quotation and citation omitted); *see also id.* at 3112, 3125, 3133 (Breyer, J., dissenting) (emphasizing that a right should especially apply to states when it is an "*antidiscrimination*" measure designed to protect "discrete and insular minorities") (quotation and citation omitted). Put another way, it is especially

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[4] Petitioner understands that copies of the briefs in *Lee* and *Bowen* remain available in the clerk's office. They also are available online on the Westlaw pages that report the denials of certiorari.

imperative to apply a guarantee of the Bill of Rights against the states when the guarantee has roots in guaranteeing full citizenship to blacks. Thus, the majority and lead dissent in *McDonald* expended considerable energy debating whether the Second Amendment right to bear arms protects African Americans from actual or potential discrimination. *Compare* 130 S. Ct. at 3039-44 (majority opinion) *with* 130 S. Ct. at 3133 (dissenting opinion).

Those concerns are directly relevant in the context of the Sixth Amendment to a unanimous verdict. "A right to jury trial is guaranteed to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Such oppression, of course, has all-too-often in our history taken the form in the criminal justice system of race discrimination. A unanimity voting requirement thus serves as a vital protection against this insidious influence. What is more, the Framers' view, "[t]rials were not just about the rights of the defendant but also about the rights of the community. The people themselves had a right serve on the jury – to govern through the jury." Akhil Reed Amar, America's Constitution 237 (2005). In short, serving on juries, and having one's voice heard, was – and remains – a fundamental act of citizenship and suffrage. *Cf. Blakely*, 542 U.S. at 306 ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their ultimate control in the judiciary.").

Louisiana's nonunanimity rule uniquely strikes at the heart of equality and citizenship. The State adopted its nonunaminity rule in its 1898 constitutional convention, whose "mission" was "to establish the supremacy of the white race in this state." *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana,* at 374 (statement of Hon. Thomas J. Semmes). More specifically, the convention was "called together by the people of this State to eliminate from the electorate the mass of corrupt and illegitimate voters who have during the last quarter of a century degraded our politics." *Id.* at 8-9 (opening remarks of E.B. Kruttscchnitt, President of the convention); *see also Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (discussing the "movement that swept the post-Reconstruction South to disenfranchise blacks"); *Louisiana v. United States*, 380 U.S. 145, 147-48 (1965) (discussing steps taken at 1898 convention to "disenfranchise[e] Negroes"). To this end, Louisiana adopted not only a nonunanimity rule at its convention but also its infamous literacy test and one of the South's first Grandfather Clauses.

In light of this history, the Louisiana Supreme Court recently noted, and did not disagree with, the argument that "the use of nonunanimous verdicts ha[s] an insidious racial component, allow[ing] minority viewpoints to be ignored, and is likely to chill participation by the precise groups whose exclusion the Constitution was proscribed." *Bertrand*, 6 So. 3d at 743. But the Louisiana Supreme Court deemed itself powerless to consider that matter in light of *Apodoca*. *Id.* Given the

reasoning in *McDonald*, this Court should directly consider the import of the connection between Louisiana's nonunanimous verdicts rule and race. At the very least, this Court could make clear that even if Oregon's rule can somehow still survive Fourteenth Amendment scrutiny, in light of its less racially sordid history, Louisiana's law surely cannot. *Cf. Hunter*, 471 U.S. at 226-32 (holding that the Fourteenth Amendment's Equal Protection Clause prohibits a state from adopting a law for a racially discriminatory purpose, even if the law could be enacted for legitimate reasons).[5]

2. The facts of this particular prosecution also places the problems associated with allowing less than unanimous verdicts in unusually stark relief. This case arose from a violent confrontation between two men while one, the victim, had crack cocaine in his system. The victim, Baker, initially "lied" to the police about the altercation. Pet. App. 17a. He later testified at trial that petitioner shot him in an unprovoked attack. Petitioner, by contrast, testified that he acted in self-defense. Specifically, petitioner testified that Baker lured him to the scene with a promise to pay him money he owed him and then tried to shoot him first in a drug-induced state. Because no physical evidence favored either story, the prosecution boiled down to a credibility dispute – exactly the kind of case in which the need for stringent procedural safeguards is at its zenith.

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[5] Oregon's nonunanimity rule was adopted by voter initiative in 1934. The voter pamphlet discussed the "problem" of holdout jurors but did not discuss race.

Yet Louisiana's nonunanimity rule provided petitioner anything but stringent protection. Initial 10-2 ballots (the determinative tally in this case) result in guilty verdicts in unanimity regimes only *64.7%* of the time. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 692 (2001) (Table 6). Even when such initial ballots in unanimity regimes lead to hung juries instead of outright acquittals, statistics show that prosecutors respond by dismissing the charges over 20% of the time, and when defendants are retried, they are acquitted in 45% of bench trials and nearly 20% of jury trials. National Center for State Courts, *Are Hung Juries a Problem?*, at 26-27 (2002). Yet, by virtue of the jury's 10-2 vote, Louisiana's judicial system judged petitioner guilty of second degree murder and sentenced him to over forty-eight years in at hard labor.

A Louisiana prosecutor recently commented that when ten of twelve jurors find a defendant guilty of a serious crime, "that's beyond a reasonable doubt." Marcia Coyle, *Divided on Unanimity,* Nat'l L.J., Sept. 1, 2008, at 1. This Court should promptly rebuke that view, which misapprehends not only legal theory but the "effect" of dispensing with the unanimity requirement "on the fact-finding process." *United States v. Lopez,* 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

3. Finally, this case aptly demonstrates the fact, as indicated above, that nonunanimous verdicts are an unfortunately common occurrence in Louisiana

and Oregon. Unless and until this Court addresses the issue, this Court will continue to receive petitions on the subject and uncertainty will reign. Better to grant review now and to put the question to rest.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

COURT OF APPEAL OF LOUISIANA

FOURTH CIRCUIT

STATE OF LOUISIANA

v.

TROY BARBOUR.

No. 2009-KA-1258

March 24, 2010

(Court composed of Judge DENNIS R. BAGNERIS, SR., Judge MAX N. TOBIAS, JR., Judge ROLAND L. BELSOME).

MAX N. TOBIAS, JR., Judge.

The defendant, Troy Barbour, was charged by bill of information on 15 June 2006 with attempted second degree murder. He pleaded not guilty at his 14 August 2006 arraignment. The trial court granted Mr. Barbour's motion to suppress the identification in part, and denied it in part, and subsequently denied his motion to suppress his statement. He was tried by a twelve-person jury on 16-17 June 2008 and found guilty as charged. On 27 June 2008 the state filed a bill of information charging Mr. Barbour as a fourth-felony habitual offender.

On 1 April 2009 the trial court denied defendant's post-verdict motion to declare La. C. Cr. P. art. 782A unconstitutional to the extent it allows for a non-unanimous guilty verdict in a non-capital felony cases.

On that date the trial court also denied Mr. Barbour's motion for post-verdict judgment of acquittal and motion for new trial. He waived all legal delays and was sentenced to forty-eight years and six months at hard labor, without benefit of parole, probation, or suspension of sentence and granted his motion for appeal.

FACTS

Mr. Barbour was convicted of the 8 January 2008 attempted second degree murder of Donald Baker ("Baker").

Baker confirmed at trial that Mr. Barbour shot him several times on the evening of 8 January 2006. He knew Mr. Barbour as Michael Lee. Baker used to do remodeling and construction work. He hired Mr. Barbour after Hurricane Katrina, after someone brought him to his attention. Mr. Barbour was living in a car and was not eating, to-wit, starving. Baker said he gave Mr. Barbour a place to live and hired him. The defendant eventually found another place to live. On one sheet rocking and paneling job at the residence of Yolanda Jones, Mr. Barbour took a swing at Baker with a hatchet; Baker fired him. Baker subsequently felt sorry for the defendant and rehired him. Mr. Barbour took a swing at Baker again with a hatchet, and Baker told him that was it, and fired him.

Subsequently, Baker was working in Ms. Jones' residence cutting a wall outlet out of a piece of paneling with a jigsaw when something happened that caused him to think he had cut himself. He moved the piece of paneling to inspect where he had cut himself.

He did not realize he had been shot until he stood up and looked to see Mr. Barbour shoot him the second time in the hip. Baker said he flipped off the defendant, and Mr. Barbour shot him a third time, in the armpit, breaking his shoulder blade in seven places. The defendant shot Baker a fourth time, in the left arm, and a fifth and final time, in his shoulder blade. He said Mr. Barbour pulled the trigger again, but the snub-nosed revolver was empty. Baker said the gist of what the defendant was saying to him as he shot him was that he was going to kill him. Baker said he moved to a different room and picked up a razor knife. When Mr. Barbour saw this he grabbed Baker's cell phone and left, telling Baker that he was going to bleed to death. The residence phone apparently had been reconnected, and Baker was able to call 911 for help. Baker told a police officer at the hospital that "Michael Lee" had shot him. On 9 January 2006, Baker was shown a photo of the defendant and confirmed that it was the person who shot him.

Baker confirmed on direct and cross examination that he was aware that while at the hospital his urine tested positive for cocaine. He said he had used cocaine a week and a half to two weeks prior to being shot. He replied in the negative when asked on direct examination whether he had taken or drank anything that would have caused him to not realize what was happening. Baker admitted on cross examination that he previously had been convicted of a crime, destruction of state property, for which he served a sentence of imprisonment. Baker denied on cross examination that he had ever threatened the defendant with a gun. Baker admitted threatening an unknown individual who had broken the windows in

the vehicle he was driving. He admitted that after he fired Mr. Barbour he told him that he would mess him up if he ever got in sight of him. Baker said he delayed telling police who shot him until he got to the hospital because he was worried that the defendant might come back and shoot him again.

Robert Shafor, M.D., was a general surgeon on call at Slidell Hospital on 8 January 2006. He treated the [sic] Baker's gunshot wounds. The victim's wounds were around his shoulders, upper thighs, and the groin. His internal organs and blood vessels were fine, although one wound from a bullet that entered his upper thigh and exited around his scrotum gave him concern because it was fairly close to major blood vessels. Dr. Shafor confirmed that a hospital toxicology test for the presence of narcotics in Baker was positive for cocaine.

Yolanda Jones-Taylor ("Jones-Taylor") testified that after Hurricane Katrina she hired Donald Baker to put a new roof on her home and do some sheetrock work. Baker brought in the defendant to help him with the work. Jones-Taylor identified Mr. Barbour in court. She stated she never saw the victim intoxicated, but acknowledged Mr. Barbour called her to complain that the victim was not paying him. She eventually helped Mr. Barbour get a job sheet rocking with her son the week before the shooting. On the day of the shooting, a Sunday, Jones-Taylor brought the defendant some papers giving him permission to be on the property where her son was working. She picked up Mr. Barbour and dropped him off. Jones-Taylor went home. Baker was there working. The defendant called Jones-Taylor and told her he had forgotten the

papers in her car. Jones-Taylor arranged to meet the defendant at a grocery store on Franklin Avenue and Leon C. Simon Boulevard. She left her home and went there, but never found the defendant. When she returned to her home, she found police there. Baker had been shot. She did not see Mr. Barbour afterwards, and did not hear from him until the next day, when he telephoned her to tell her he had shot Baker and that Baker was probably dead.

Jones-Taylor stated on cross examination that she did not tell Baker she was going to meet the defendant on the day of the shooting because she did not want him to know she was going to meet him. She confirmed that she knew of the feud between the two men and did not want to cause any more problems. Jones-Taylor also stated that she remembered when someone broke the windows on Baker's car, that Baker thought the defendant had done it, and that Baker was angry and upset about it. Baker told her he had a gun that he kept for his protection. She told Baker she did not want any guns in her home.

Alice Barthe ("Barthe") testified that her stepdaughter, Katy, and the defendant stayed with her and her husband in their Tylertown, Mississippi home, and later in a camper on their property from November 2005 until January 2006. A snub-nosed revolver she purchased around the first of January 2006, just after Christmas, was stolen from her home approximately four days after she bought it. It was stolen late Saturday night or early Sunday morning. Barthe said Mr. Barbour and his friend, Jamie, were in the residence that Saturday when she, her stepdaughter, and her husband went to an auction

approximately an hour and a half drive away. When they returned Mr. Barbour and Jamie were gone, a Cadillac automobile was gone, and the revolver was missing from her nightstand. Barthe identified the defendant in court, as well as her revolver.

Ellis Barthe, Alice's husband, testified similarly to his wife. He said they did not get back from the auction until past midnight Sunday.

Susan Barthe, the mother of Katy Barthe, testified that Mr. Barbour and Baker did work on her home, and that the defendant dated her daughter. She identified some recordings made of telephone messages left for Katy on her telephone by Jones-Taylor and the defendant after Baker was shot.

Former New Orleans Police Department Detective Jeffrey Lehrmann testified that he responded to the scene of the shooting on 8 January 2006. The victim was in pain and not very cooperative. A spent bullet was recovered near where the victim was lying on the floor. Jones-Taylor drove up while he was there, and he took a statement from her. At the hospital, Baker told him who had shot him. Detective Lehrmann determined that Michael Lee and Mr. Barbour were the same person. Baker identified a photograph of the defendant. Mr. Barbour was eventually arrested. Mr. Barbour admitted to Detective Lehrmann that he used the name of Michael Lee. During his investigation Detective Lehrmann recovered the revolver stolen from the home of Alice and Ellis Barthe.

Charles Collins, a case manager for a drug court at Orleans Parish Criminal District Court, testified on

behalf of Mr. Barbour that cocaine normally stays in a chronic user's system for three to four days and in a recreational user's system for three days.

New Orleans Police Department Sergeant Leonard Davis wrote a police report on the shooting. He testified that Baker told him that an unidentified white male came inside the residence where he was working, and stated: "Give me the money punk," then produced a handgun and shot him. Sergeant Davis admitted on cross examination that Baker's demeanor was fearful, among other things, and that he was in great pain. Asked whether his ability to interview the victim might have been hampered by his condition, Sergeant Davis replied: "Very much so."

Mr. Barbour testified that he was from Michigan. He mostly did construction work. He had been convicted of safe tampering, twice convicted of breaking and entering, for being a prisoner in possession of a weapon, and for issuing checks with insufficient funds. He was on parole from Michigan, and admitted that he had violated his parole by leaving Michigan without permission. He said that he had to get a job to remain on parole, but could not find one. He asked for permission from his parole officer to travel to New Orleans to find work, but permission was denied. He thought his parole would be revoked anyway if he stayed, because the cutoff period for him to find a job was approaching; thus he left. Mr. Barbour stated that he had never been convicted of a crime of violence. He arrived in New Orleans in September 2005, after Hurricane Katrina had struck. He used an alias, the name of a friend, because he was on the run for a parole violation.

Mr. Barbour said he met and worked with Baker in the area after Hurricane Katrina, and that they made pretty good money, which they split fifty-fifty at the beginning. He said that after working with Baker for about one week he discovered that Baker smoked crack cocaine. He said when Baker received money for work he performed, he would go to a crack house and be gone for a day, sometimes three days. He said when Baker used crack cocaine his eyes would get real wide and he would get aggressive and violent.

Mr. Barbour said Baker had a gun and he had seen it more than once. He said Baker was always shortchanging him and stealing the tools. Disputes over money and ownership of tools occurred. Baker threatened him all the time and had threatened him with a weapon. Baker once said that if he ever saw him again, he would shoot him. Mr. Barbour said that after the trouble between them, he had to leave Louisiana and move to Mississippi. He said that after the split with Baker, he got a friend from Michigan, Jamie Stone, to come to New Orleans and work with him on the job for Jones-Taylor's son.

Mr. Barbour stated that on the day of the shooting, Baker telephoned him to say that if he wanted his money he could come to Jones-Taylor's home to pick it up. He asserted that Baker owed him $3,200.00 for work he had done on Jones-Taylor's home. The defendant told Baker he would be over in a minute. He said that at first he was excited, but on the way there he thought about things and began to feel uneasy. He questioned why Baker now wanted to give him money, especially after everything that had happened. He said

he approached Jones-Taylor's home with caution. He admitted that he had a gun, one he had taken without permission from Ellis Barthe in Mississippi. He said the gun previously introduced in evidence by the state looked like the one he took from Ellis Barthe. Mr. Barbour said he took the gun because Baker had made a lot of threats on his life and those of his loved ones around him.

Mr. Barbour said Jones-Taylor was not there when he went to her home. Baker answered the door, turned around, and started walking into the house. Baker accused the defendant of screwing him out of job, whereupon Mr. Barbour retorted that Baker had screwed himself. He asked Baker if he was going to pay him. Baker replied that he was. The defendant said Baker then reached behind a box and pulled out a .44 Magnum revolver with a six-inch barrel. Mr. Barbour claimed Baker reached around to take a shot at him. Mr. Barbour said he grabbed a halogen light and shined it in Baker's face. He said Baker fired a shot. The defendant then fired a number of shots at Baker, who dropped his gun. Mr. Barbour picked it up. He asked Baker if he was crazy and told him the money was not that important, that Baker could keep it. The defendant said Baker told him that it was not about the money. Mr. Barbour then ran out of the house. He discarded the gun in a debris pile alongside the street. He said neither he nor Baker pulled out a knife. He denied taking Baker's cell phone.

Mr. Barbour admitted hiding from police after the incident. When he was arrested, he did not tell Detective Lehrmann his story because he was not sure Baker would tell police he shot him, since Baker had

tried to kill him. The defendant replied in the negative when asked whether, when he went to Jones-Taylor's house that evening, he had any intention of shooting Baker. He said that he shot Baker in self-defense.

The defendant said on cross examination that when he shot Baker, Baker was under the influence of crack cocaine. He knew that because he smelled it when he entered the residence, and because Baker's eyes were bulging and he was breathing hard. He denied ever having gone after Baker with a hatchet. After the shooting he jumped into the blue Cadillac in which his friend, Jamie, was sitting with engine running, and they left.

Jones-Taylor was recalled as a witness by the state. She testified that when the defendant telephoned her the day after the shooting he told her that he was sorry he had done it, but that at least he had gotten her out of the house. He told her he thought Baker was dead. She did not tell him that Baker was alive.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NO. 1

In this first assignment of error, Mr. Barbour argues that the trial court erred in denying his motion for a mistrial based on the state eliciting testimony from the victim concerning other crimes committed by the defendant.

The issue arose when the state was questioning its first witness in its case in chief, the victim. The state was eliciting from the victim a description of the events that occurred at Jones-Taylor's residence, where the defendant and the victim had been working, and where the shooting occurred. The state was directing questions to the victim concerning the defendant's work with the victim, and the following colloquy occurred:

> Q. How long did the defendant actually do the sheetrock work with you inside that residence?
>
> A. About a week, week and half, almost two.
>
> Q. Did he help you finish it?
>
> A. No.
>
> Q. What happened?
>
> A. He took a swing at me with a hatchet and I fired him. I felt sorry for him, brought him back. And he took another swing at me, and I told him that was it.
>
> Q. And where did that second incident occur?
>
> A. In the street in front of Yolanda's house.

At that point defense counsel objected. The jury was removed from the courtroom and Mr. Barbour's counsel moved for a mistrial, which the trial court denied. The trial court strongly admonished the state, and when the jury returned the court admonished it

that it was to disregard the testimony as if it never occurred.

La. C. E. art. 404(B)(1) states:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

The Supreme Court set forth the applicable law in *State v. Rose,* 06-0402, pp. 12-13 (La. 2/22/07), 949 So.2d 1236, 1243-1244, as follows:

> It is well settled that courts may not admit evidence of other crimes to show the defendant as a man of bad character who has acted in conformity with his bad character. La. C. E. art. 404(B)(1); *State v. Williams,* 96-1023, p. 30 (La. 1/21/98), 708 So.2d 703, 725; *State v. Prieur,* 277 So.2d 126, 128 (La. 1973). Evidence of other crimes, wrongs or acts committed by the defendant is generally inadmissible because of

the "substantial risk of grave prejudice to the defendant." *Prieur*, 277 So.2d at 128. However, the State may introduce evidence of other crimes, wrongs or acts if it establishes an independent and relevant reason such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. La. C. E. art. 404(B)(1). The State must provide the defendant with notice and a hearing before trial if it intends to offer such evidence. *Prieur*, 277 So.2d at 130. Even when the other crimes evidence is offered for a purpose allowed under art. 404(B)(1), the evidence is not admissible unless it tends to prove a material fact at issue or to rebut a defendant's defense. *State v. Martin,* 377 So.2d 259, 263 (La. 1979); *Prieur*, 277 So.2d at 130. The State also bears the burden of proving that defendant committed the other crimes, wrongs or acts. *State v. Galliano,* 2002-2849, p. 2, (La. 1/10/03), 839 So.2d 932, 933 (per curiam).

Although a defendant's prior bad acts may be relevant and otherwise admissible under La. C. E. art. 404(B), the court must still balance the probative value of the evidence against its prejudicial effects before the evidence can be admitted. La. C. E. art. 403. Any inculpatory evidence is "prejudicial" to a defendant, especially when it is "probative" to a high degree. *State v. Germain*, 433 So.2d 110, 118 (La. 1983). As used in the balancing test, "prejudicial" limits the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial. *Id. See also Old*

> *Chief v. United States,* 519 U.S. 172 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). (Footnote omitted).

In addition to the notice requirement imposed upon the state by La. C. E. art. 404(B)(1), La. C. Cr. P. art. 720 states that, upon motion of the defendant, the court shall order the district attorney to provide the defendant with the state's intent to offer evidence of the commission of any other crime admissible under the authority of La. C.E. art. 404. The defendant's trial counsel filed a boilerplate pleading seeking an order from the court directing the state to comply with, *inter alia,* La. C. Cr. P. art. 720.

The state does not dispute that it did not give notice of its intent to use any evidence of any other crime committed by the defendant. Neither does the state argue that evidence that the defendant had swung at the victim with a hatchet on two occasions prior to the day he shot the victim five times was admissible under La. C.E. art. 404 or any other authority.

The state argues instead that, even assuming it failed to give notice and the evidence was inadmissible, the trial court did not clearly abuse its discretion in denying the motion for mistrial and/or that the error in admitting the evidence was harmless.

La. C. Cr. P. art. 775 states that upon motion by a defendant a mistrial "shall be ordered" when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by La. C. Cr. P. art. 770 (mandatory mistrial upon motion of the defendant when prejudicial comment made within hearing of the jury by the judge, district attorney, or a court official referring to, *inter alia,* another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible) or La. C. Cr. P. art. 771 (the trial court may grant a mistrial upon motion of the defendant if the court is satisfied that an admonition is not sufficient to assure the defendant of a fair trial when a remark or comment made within the hearing of the jury during trial or in argument is of such a nature that it might create prejudice against the defendant in the mind of jury).

Mistrial is a drastic remedy which should only be declared upon a clear showing of prejudice to the defendant. *State v. Leonard,* 05-1382, p. 11 (La. 6/16/06), 932 So.2d 660, 667. The mere possibility of prejudice is insufficient to warrant a mistrial. *Id.* Stated a slightly different way, "[m]istrial is a drastic remedy, and is warranted only when the defendant has suffered substantial prejudice such that he cannot receive a fair trial." *State v. Wessinger,* 98-1234, p. 24 (La. 5/28/99), 736 So.2d 162, 183. "The determination of whether actual prejudice has occurred, and thus whether a mistrial is warranted, lies within the sound discretion of the trial judge, and this decision will not be overturned on appeal absent an abuse of that discretion." *Id.*

The victim was the first witness to testify in the trial. His single statement referring directly to the defendant having swung at him with a hatchet is contained in the victim's trial testimony. In hindsight, considering the evidence that followed, we do not find that the trial court abused its discretion in implicitly finding that the statement by the victim did not cause substantial prejudice to the defendant such that he would not be able to receive a fair trial.

Moreover, the erroneous admission of other crimes evidence due to the state's failure to give the defense proper notice, or for any other reason, is subject to the harmless error rule. *State v. Johnson,* 94-1379 (La. 11/27/95), 664 So.2d 94, 102; *State v. Plaisance,* 00-1858, p. 27 (La. App. 4 Cir. 3/6/02), 811 So.2d 1172, 1192. *See also State v. Shaw,* 07-1427, p. 25 (La. App. 4 Cir. 6/18/08), 987 So.2d 398, 412, *writ denied, State ex rel. Shaw v. State,* 08-1957 (La. 5/15/09), 8 So.3d 574 ("The erroneous admission of other crimes evidence is subject to the harmless error analysis."). An error is harmless if it can be said beyond a reasonable doubt that the guilty verdict rendered in the case was surely unattributable to that error. *State v. Robertson,* 06-1537, p. 9 (La. 1/16/08), 988 So.2d 166, 172.

Mr. Barbour admitted shooting the victim. While he claimed self-defense, his testimony contradicted that of the victim and that of Jones-Taylor, at whose residence the victim was working on the day he was shot. Jones-Taylor's testimony indicated that she had been sympathetic to the defendant insofar as his employment plight and squabbles with the victim. She arranged for the defendant to work for her son doing

sheetrock work. She testified that she and the defendant arranged to meet at a grocery store on the evening of the shooting so Jones-Taylor could give him some documents giving him lawful permission to be on the premises of the residence her son was working on in post-Hurricane Katrina New Orleans. Jones-Taylor left her residence to meet the defendant, but he was not at the location where they had agreed to meet. Jones-Taylor returned to her residence to find the victim shot. Mr. Barbour fled and continued to actively elude police, knowing he was wanted in connection with the shooting of the victim.[1] The defendant telephoned Jones-Taylor the day following the shooting, telling her he was sorry he had done it, but that at least he had gotten her out of the house. He admitted to stealing and taking a revolver to Jones-Taylor's residence for his meeting with the victim. Thus, testimony suggests that the shooting was planned by the defendant.

We note the existence of discrepancies in Baker's testimony. He denied owning a gun, but Jones-Taylor said that he told her he did own a gun. The victim lied to police at the scene of the shooting about who had shot him, only divulging the defendant's identity after he was taken to the hospital. The victim explained that he was afraid to name Mr. Barbour while in Jones-Taylor's home because he feared the defendant could be nearby.

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[1] Flight is a circumstance from which guilt can be inferred. *State v. Smith,* 98-2645, p. 5 (La. App. 4 Cir. 1/26/00), 752 So.2d 314, 317-318; H*State v. Recasner,*H 98-2518, p. 3 (La. App. 4 Cir. 12/22/99), 750 So.2d 336, 338.

Nevertheless, assuming *arguendo* (that the testimony by the victim that the defendant had on two occasions prior to the day of the shooting swung at him with a hatchet was inadmissible), viewing all of the evidence, it can said beyond a reasonable doubt that the guilty verdict rendered in the instant case was surely unattributable to the testimony itself or any error relative to the testimony.

We find no merit to this assignment of error.

ASSIGNMENT OF ERROR NO. 2

In the second of his two assignments of error, Mr. Barbour argues that the trial court erred in denying his motion to declare La. C. Cr. P. art. 782 A unconstitutional to the extent that it allows for a non-unanimous verdict in non-capital felony cases.

La. C. Cr. P. art. 782A states in pertinent part that "[c]ases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict." The instant case was one in which punishment was necessarily confinement at hard labor. Mr. Barbour was tried by a twelve-person jury, ten of whom concurred to render the verdict of guilty as charged of attempted second degree murder.

The defendant argued in his written motion that La. C. Cr. P. art. 782A violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

In *State Bertrand,* 08-2215 (La. 3/17/09), 6 So.3d 738, the trial court found that La. C. Cr. P. art. 782 A violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, relative to the number of jurors needed to concur to render a verdict in cases in which punishment is necessarily confinement at hard labor, the same issue raised by the defendant in the instant case. The Louisiana Supreme Court reversed, stating in its conclusion:

> Due to this Court's prior determinations that Article 782 withstands constitutional scrutiny, and because we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12-person jury verdicts are constitutional may someday be overturned, we find that the trial court erred in ruling that Article 782 violated the Fifth, Sixth, and Fourteenth Amendments. With respect to that ruling, it should go without saying that a trial judge is not at liberty to ignore the controlling jurisprudence of superior courts.

Bertrand, 08-2215, p. 8, 6 So.3d at 743.

Bertrand is dispositive of defendant's argument in this assignment of error which we find is meritless.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence is affirmed.

AFFIRMED.

BELSOME, J., concurs with reasons.

I write separately to acknowledge that historically, a defendant could not be convicted unless the jury verdict was unanimous. Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial,* 106 Colum. L. Rev. 959, 979 (2006)(citing *Apodaca v. Oregon,* 406 U.S. 404, 407 & n. 2 (1972)(White, J., plurality opinion); *see also State v. Williams* (unpub.), 2009-0602 (La. App. 4 Cir. 1/27/10, 26 So.3d 321) (Belsome, J., dissenting). The concept of a unanimous jury verdict began as early as the fourteenth century. *Apodaca v. Oregon,* 406 U.S. at 407-08) (citing 1 William Holdsworth, *A History of English Law* 318 (1956), and James B. Thayer, *The Jury and Its Development,* 5 Harv. L. Rev. 249, 295, 296 (1892)); *see also Johnson v. Louisiana,* 406 U.S. 380, 383 (Douglas, J., dissenting). Ultimately, however, the United States Supreme Court concluded that the Constitution did not require unanimous jury verdicts. Rubenstein, *Verdicts of Conscience, supra,* at 979 (citing *Apodaca v. Oregon*, 406 U.S. at 410-411).

With regard to Louisiana jurisprudence, this Court recently followed *State v. Bertrand,* 08-2215 (La. 3/17/09), 6 So.3d 738, in *State v. Taylor,* 2009-0041, p. 8 (La. App. 4 Cir. 9/4/09), 21 So.3d 421, 426, holding that "[t]his recent jurisprudence [referring to *State v. Bertrand*] clarifies that La. C. Cr. P. art. 782(A)'s presumption of constitutionality remains intact." Additionally, prior to the Louisiana Supreme Court's decision in *State v. Bertrand,* this Court found that a defendant's argument that Article 782(A) was unconstitutional lacked merit, relying upon the First

Circuit case of *State v. Lee* and noting the Louisiana Supreme Court's denial of writs in that case. *State v. Tillman,* 2008-0408, p. 25 (La. App. 4 Cir. 3/4/09), 7 So.3d 65, 78 (*citing State v. Lee,* 2005-0456 (La. App. 1 Cir. 5/16/07), 964 So.2d 967, *writ denied, State v. Lee,* 2007-1288 (La. 3/7/08) 977 So.2d 896, *cert. denied, Lee v. Louisiana,* __U.S. __, 129 S. Ct. 130 (2008)). In so holding, this Court quoted the following language from *State v. Lee*:

> These Supreme Court decisions [*Ring v. Arizona,* 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Jones v. United States,* 526 U.S. 227 (1999)] do not address the issue of the constitutionality of a non-unanimous jury verdict but rather, address the issue of whether the assessment of facts in determining an increased penalty of a crime beyond the prescribed statutory maximum is within the province of the jury or the sentencing judge. These decisions stand for the position that any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and approved beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. *Nothing in these decisions suggests that a jury's verdict must be unanimous. Accordingly, LSA-Const. Art. I § 17(A) and LSA-C. Cr. P. art. 782(A) are not unconstitutional and do not violate the defendant's Sixth Amendment right to a trial by jury.*

State v. Tillman, 2008-0408, p. 25, 7 So.3d 65, 78 (*quoting State v. Lee,* 2005-0456, p. 4, 964 So.2d 967,

973 (emphasis added)). Therefore, until otherwise directed by the United States Supreme Court or the Louisiana Supreme Court, the trial court's denial of defendant's motion to declare La. C. Cr. P. art. 782(A) unconstitutional must be affirmed. I respectfully concur.

APPENDIX B

IN THE LOUISIANA SUPREME COURT

* * * * * *

On the **19th day of November, 2010**, the following actions were taken by the Supreme Court of Louisiana in the cases listed below:

* * * * * *

WRIT APPLICATIONS DENIED:

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2010-K -0934 STATE OF LOUISIANA v. TROY BARBOUR (Parish of Orleans)

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